Supreme Court, U.S.
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No. 93-261

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ARVIDA REALTY SALES, INC., a Florida Corporation, ARSLP, INC., an Illinois Corporation, and ARVIDA REALTY SALES, LTD., a Delaware Limited Partnership,
Petitioners,

v.

PATRICIA SEAMAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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27 pp

QUESTION PRESENTED

As explained *infra,* pp. 5-8, none of the "Questions Presented" as stated at pp. i-ii of the Petition is presented. The only question that *could* be presented—and Petitioner has chosen not to directly present it—is the following:

> Did the Court of Appeals err in the reversal of the District Court, holding that the Complaint stated a claim for relief under Section 510 of ERISA, 29 U.S.C. § 1140, where the Complaint alleged that the Plaintiff was terminated, that the stated reason for her termination was to eliminate the cost of providing health insurance coverage and continued participation in the employer's 401(k) Plans, and that she was terminated, along with other similarly situated employees, in order to deprive them of benefits to which they might become entitled under the employer's employee welfare benefit plans, in violation of ERISA.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent, Patricia Seaman ("Seaman"), was one of a group of individuals employed by Arvida in the capacity of real estate sales associate pursuant to written employment contracts. Each of these employment contracts specifically designated the sales associate as an "employee" and acknowledged Arvida's obligation to make Social Security contributions, pay income tax withholding, etc.

Effective May 1, 1989, Arvida terminated its sales associates, and immediately offered to re-employ them as "independent contractors" pursuant to separate written agreements which specifically identified them as independent contractors, rather than employees. Seaman and

the other sales associates were told that they would no longer be entitled to participate in the employer's health insurance and Section 401(k) Plans.

> Seaman filed suit in the District Court, alleging that 5. . . . The stated reason for the termination was in order to eliminate the cost of providing health insurance coverage to the sales employees (and employer 401(k) and FICA contributions), . . .

and that until her termination Plaintiff was a participant in the employee health insurance programs, which were employee welfare benefit plans within the meaning of ERISA, that she was a participant in the 401(k) Plan, which was also an employee welfare benefit plan within the meaning of ERISA, and that

> 9. Plaintiff and the other real estate sales employees were terminated, in order to deprive them of benefits under the aforesaid employees welfare benefit plans, and such termination constituted discrimination and interference with protected rights, in violation of the provisions of ERISA.[1]

Arvida filed Motions to Dismiss the Complaint, asserting that the health insurance plan was not a pension plan, and that rights thereunder could not be vested, so that the protections of Section 510 of ERISA did not apply. Arvida also contended that since Seaman's rights to contributions already made into the 401(k) Plan remained vested, she had no right to continuing participation, and the protections of ERISA did not apply.

The District Court granted Arvida's Motion to Dismiss, agreeing with Arvida's argument that Plaintiff had no pending claims under the health plan, and no rights to any future benefit under the 401(k) plan, that entitlement to health insurance and future participation in the 401(k) plan were not vested or accrued benefits, and

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[1] Plaintiff's Complaint is included in the Appendix to this Brief at pp. 1a-7a.

therefore not subject to protection by Section 510 of ERISA.

Arvida did not urge in the District Court, and the District Court did not consider, any claim of business necessity, or any contention that Arvida's termination of Plaintiff was for any reason other than that alleged by Seaman.

The Court of Appeals reversed the decision of the District Court, noting that there was a wealth of authority that continued participation in an employee welfare plan was a right under ERISA, and that continued participation in a 401(k) plan was similarly a right protected under ERISA.[2] The Court of Appeals held that the plain language of Section 510 precluded termination where the object was to prevent or interfere with "the attainment of any right to which the participant may become entitled". The Court of Appeals went on to observe that

> The validity of a § 510 claim does not hinge upon whether the benefits involved are vested, but upon the purpose of the discharge. A plaintiff must show that the employer had the specific intent to interfere with the employee's right to benefits. (Petition, pp. A5-6.)

The Court of Appeals correctly noted that

> Seaman alleged that Arvida terminated her because she would not give up the right to continued participation in the health plan and for the specific purpose of interfering with her rights under ERISA. (Petition, p. A6).

Since this case arose on a Motion to Dismiss, Arvida did not present, and neither the District Court nor the Court of Appeals decided, the proof issues involved in

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[2] The Decision of the Court of Appeals is found in the Petition Appendix, pp. A1-10.

determining the employer's intent, business justification, or any other motive. As the Court of Appeals observed,

> . . . whether an employer intends to interfere with the employee's right to future benefits is a factual inquiry to be answered on a case-by-case basis. (Petition, p. A5).

The Court of Appeals did not hold, as Arvida suggests, that Arvida had violated ERISA, but simply that the Complaint had sufficiently alleged a violation of the statute. While some of the Court's observations may have been prompted by Arvida's concession of its intent to deprive Plaintiff of participation in the health insurance plan, the *holding* focused on the allegations of Seaman's Complaint.[3] Contrary to the assertions of Arvida, the Court of Appeals did not preclude the assertion of defenses, but merely, and correctly, found that the Complaint stated a claim within the plain language of Section 510 of ERISA.

Arvida's Petition for Rehearing and Suggestion of Rehearing En Banc was denied, no member of the Court of Appeals having requested a poll on rehearing en banc. Petition at pp. A12-13.

REASONS FOR DENYING THE WRIT

This case does not, contrary to Arvida's Petition, present a conflict with decisions of this Court, nor has Arvida shown that there is a conflict with a decision of another Court of Appeals on the same matter. Arvida claims a conflict, "in principle", with the "spirit" of cases

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[3] "Nevertheless, if Seaman's allegations are true, Arvida has violated § 510." (Petition, p. A9). Arvida complains in its Petition, at p. 11, fn. 7, that its "honesty" subjected it to *per se* Section 510 liability. As discussed *infra*, the Court of Appeals did not decide liability, but merely whether the Complaint stated a cause of action. Arvida's "honest admissions" as to its intent were much more candid in Briefs to the Court of Appeals. Plainly Arvida does not intend to make that mistake in this Court.

which indicate reluctance to create "new" causes of action, or expand damages or standing beyond that clearly expressed by Congress. This case is not inconsistent with those principles.

The Court of Appeals reversed the dismissal, on initial motions and before Answer, of a Complaint (Appendix to this Brief). Arvida overstates and misstates what the Court of Appeals did, the reasons given, and the potential consequences. Section 510 of ERISA *expressly* makes it unlawful to discharge a participant in an employee benefit plan, "for the purpose of interfering with the attainment of any right to which such participant may become entitled". 29 U.S.C. § 1132(a)(3) authorizes suit by a participant to enforce that prohibition, and for appropriate relief.

There is no conflict, "in principle" or otherwise, with *Massachusetts Mutual Life Ins. Co. v. Russell*, 508 U.S. ——, 113 S. Ct. 2063, 124 L.Ed.2d 161 (1993). Because this case is presented based only on the Complaint and Motion to Dismiss, there is no way there could be any conflict with the "burden of proof" or "mixed motive" cases such as *McDonnell-Douglas Corp. v. Green*, 411 U.S. 292 (1973) or *St. Mary's Honor Center v. Hicks*, 509 U.S. ——, 113 S. Ct. 2472, 125 L.Ed.2d 407 (June 23, 1993). Nor is there any colorable claim of pre-emption of state law. Arvida is grasping at straws.

I. NONE OF THE "QUESTIONS PRESENTED" IN THE PETITION IS ACTUALLY PRESENTED IN THIS CASE.

1. Contrary to the assertions in the Petition, the Court below did not recognize "an implied ERISA 'wrongful discharge' claim based solely upon loss of unaccrued, unvested, and prospective benefits"; it held only that an allegation that Plaintiff was discharged in order to deprive her of benefits from an employee welfare

benefit plan stated a claim within the plain language of Section 510 of ERISA, 29 U.S.C. § 1140. Thus, the first question was not presented.

2. Nor did the Court of Appeals hold that ERISA Section 510 prohibits an employer from restructuring its workforce to reduce payroll costs; as noted, the case as presented to the District Court and the Court of Appeals was premised on allegations that the object of the termination was to deprive Plaintiff of benefits and continued participation in employee welfare benefit plans, and Arvida conceded as much in the Court of Appeals. Accordingly, the second question is not presented.

3. Petitioners' third "Question Presented" misstates this case. While an employer may have the right to amend or change its plan, such is not an "absolute" right to amend the plan. The plan amendment could not violate the structural requirements of ERISA, for example, and might also be limited by provisions of Title VII, the Americans with Disabilities Act, or other specific protective legislation. A *discriminatory* amendment might well be unlawful. Arvida has not "achieved the same result" by converting *some* of its employees to independent contractors. The plans remain in effect, with (for purposes of this Petition) all of the same terms and conditions, except that Plaintiff and certain others have been terminated in order to prohibit them from participating. Had the plans been amended, across the board and with no discriminatory or other unlawful intent, an entirely different question would have been presented. That is not, however, this case.

4. Contarry to the implication of the Petition, the Court of Appeals did not consider, much less reject, the employer's "business justification" defense. Arvida seeks to have this Court review the Court of Appeals' reversal of the District Court's Order dismissing the Complaint on initial motions, and before Answer. "Business justification" has never been asserted, much less rejected, ex-

cept in this Petition. Although the Complaint alleges, as the statute requires, that the purpose of the termination was discriminatory, the Court of Appeals did not find it necessary to, and did not, determine a "business justification" *defense*. Rather, it simply found the Complaint sufficient. In an effort to obtain unwarranted review by this Court, Arvida has posed a question, and complained of a decision, which has not been presented; since this case arises on initial Motions to Dismiss, before Answer, consideration of this issue is premature, at best.

5. Contrary to the assertion in the Petition, the Court of Appeals did not hold that ERISA Section 510 creates or establishes benefit plan vesting beyond that contained in the statute or the plan documents. The question of whether the Plaintiff had "vested" rights under the plans in issue was a false issue raised in the District Court. The Court of Appeals correctly held that the statute prohibited intentional interference with rights to participate in whatever plan was then in effect, a holding which is clearly required by the statute, as numerous courts have held.

All that the Court of Appeals decided is that "an employer may not terminate an employee for the purpose of avoiding payment of plan benefits" (Petition at p. A7). It did not decide what those benefits might be. Bearing in mind that this case arises on a Motion to Dismiss, and that the allegations of the Complaint must be taken as true, the Court of Appeals holding is clearly correct, and presents no question that this Court should consider at this juncture.

The gist of the Court of Appeals decision, contrary to Petitioners' mischaracterization, is found in the Petition, at p. A9:

> If the employer decides to offer benefits, it must allow its employees to take advantage of the plan and must administer the plan in a nondiscriminatory

fashion. But the employer can make the initial decision whether to offer any benefits at any time. Nevertheless, if Seaman's allegations are true, Arvida has violated § 510. Arvida did not change the terms of its plan; rather, it threatened to terminate its salespeople unless they agreed to become independent contractors, performing the same job but ineligible to receive the benefits previously offered to them as employees and still offered to Arvida's remaining employees. It terminated plaintiff for declining to work without the benefits she previously enjoyed though offered to remaining employees. Plaintiff was, in the exact language of § 510, discharged "for exercising [a] right to which [she was] entitled under the provisions of an employee benefit plan." To excuse this action would prevent § 510 from fulfilling its congressionally intended purpose. That Arvida, by changing the terms of its plan, lawfully could have deprived its salespeople of these benefits does not allow it to offer benefits but prevent its salespeople from taking advantage of those benefits on pain of discharge.

II. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT, OR BETWEEN THE COURTS OF APPEAL.

A. Introduction.

Despite the apocalyptic language and expansive claims asserted by Arvida in its Petition for Certiorari, the issue presented in this case is really quite narrow. The Court of Appeals reversed the decision of the District Court granting a Motion to Dismiss the Complaint, because the District Court misconstrued the provisions of Section 510 of ERISA to apply only to vested benefits, essentially pension plans. The District Court failed to appreciate that Section 510 applied to employee benefit plans, which are broadly defined in the statute [4] and specifically include the type of plans at issue here.

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[4] 29 U.S.C. § 1002(3). It includes *both* pension plans and welfare plans, or combinations of plans.

The Court of Appeals found that Plaintiff's Complaint stated a claim within the plain language of the statute, and reversed the dismissal of the Complaint. The broader questions urged by Arvida go far beyond the issues presented to, and decided by, either the District Court or the Court of Appeals. Indeed, reading the Petition would cause one to believe that this case had been tried, resulting in a judgment for Plaintiff after the District Court had either directed a verdict, stricken defenses, or instructed the jury that the employer's "business justification" should not be considered, or was not sufficient as a matter of law. As noted, this case arises on a Motion to Dismiss the initial Complaint, before Answer, and "business justification" has not been raised, much less established.

B. The Court Of Appeals Did Not Depart From Settled Law Or Conflict With Other Courts Of Appeal In Reversing Dismissal Of The Complaint.

The Court of Appeals determination that Section 510 of ERISA applies to employee welfare benefit plans, including health insurance plans—a determination that Petitioner does not directly challenge in its Questions Presented—is firmly grounded in the plain language of the statute, and the decisions of numerous Courts of Appeals. Contrary to Arvida's claim, the Court of Appeals decision does not strip employers of a "business necessity" defense, or determine ultimate liability. The Court of Appeals specifically premised its conclusion on the assumption that Plaintiff's allegations would be proven. The determination as to whether the employer's intentions and actions were lawful or unlawful remains for the trier of fact. All the Court of Appeals has decided is that the Complaint states a claim for relief, and that further proceedings will be required.

C. The Court Of Appeals Correctly Determined That Section 510 Of ERISA Applies To Welfare Plan Benefits.

This case does not require review because of some perceived inconsistency with the "spirit" of ERISA. Contrary to the suggestion of Petitioner, the cause of action Plaintiff brings is expressly authorized by the statute. It is neither "implied" nor somehow "inconsistent" with the "spirit" of the overall statute. Rather, it is a conclusion which is inescapable from the plain language of the statute.

When Congress provided that it would be unlawful for an employer to terminate an employee (participant)

> ". . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . ."

and then authorized a participant to bring an action for violation of the statute, 29 U.S.C. § 1132(a)(3), it plainly anticipated that an employee could bring an action for termination where the object of the termination was a violation of ERISA. Although Petitioner claims a conflict in the Circuit Courts of Appeal, it cites no case in which a court has held that an employee/participant may not complain of his termination, where such termination is claimed to be *for the purpose of* depriving him of welfare plan benefits.[5]

To the contrary, as noted by the Court of Appeals, a number of Courts of Appeals have held that an employer violates Section 510 by discharging employees to prevent them from taking advantage of benefits which are not yet

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[5] The Court of Appeals noted (Petition, p. A6-7) that the instant case was factually distinguishable from *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 113 S. Ct. 482, 121 L.Ed.2d 387 (1992) and *Owens v. Storehouse, Inc.*, 984 F.2d 394 (11th Cir. 1993), which involved amendments to the plan, rather than termination of employees. Arvida seems unable, or unwilling, to grasp the distinction.

vested (Petition, at p. A5). Plainly, there is no conflict in the Circuits on this point. Arvida's attempt to re-characterize Plaintiff's claim to present the appearance of conflict between the Courts of Appeals should be rejected.

As noted, Arvida argued to the District Court, and the District Court accepted, the proposition that Section 510 of ERISA protects only vested rights, essentially rights under pension plans. Accordingly, since Plaintiff was principally complaining of termination to deprive her of benefits in an employee welfare benefit plan, rather than a vested pension plan, the District Court concluded that she stated no claim.

As the Court of Appeals observed, however,

> The parties do not dispute that before her termination Seaman was an employee entitled to participate in Arvida's benefits plan, or that the health insurance and 401(k) plan are included in the phrase, "employee benefit plan," and thus are covered by ERISA. (Petition, at p. A3).

Clearly, if Congress had intended Section 510 to apply only to rights under pension plans, it would have used used the term "employee pension benefit plan" rather than the broader term "employee benefit plan". Section 3 of ERISA, 29 U.S.C. § 1002(2) and (3). After reviewing and approving numerous cases where other Courts of Appeals had applied Section 510 to benefit plans where the benefits were not vested, the Court of Appeals observed

> "We agree with the reasoning of the Fourth Circuit in *Conkwright* which held that Congress did not intend to leave employees unprotected once their rights were vested and that § 510 prohibits the employer from discharging an employee for the purpose of preventing the employee from receiving additional vested benefits. 933 F.2d at 238. The Fourth Circuit's conclusion is consistent with § 510's language,

which protects "the attainment of any right to which such participant may become entitled" . . . The validity of a § 510 claim does not hinge upon whether the benefits involved are vested, but upon the purpose of the discharge." (Petition A5).

D. Arvida's "Business Necessity" Claim Has Not Been Rejected; It Has Not Even Been Made.

Finally, and perhaps most significantly, the issues Arvida suggests are at best premature. The District Court properly should consider the allegations of the Complaint as true, and the Court of Appeals has correctly determined that they are sufficient to state a claim. The Court of Appeals did not hold that Plaintiff would necessarily win, unless of course, "Seaman's allegations are true" (Petition A9). This is not unusual. As a general rule, if a Plaintiff proves her case, she is supposed to win.

In attempting to create a fictional conflict in the Courts of Appeals. Arvida raises a "business necessity" defense, and implies that this defense has been stricken, barred, or rejected. Arvida makes numerous references throughout its Petition to what it characterizes as *Plaintiff's* claim, allegations, or admissions. These are actually the "spin" Arvida now tries to place on the Complaint.

In order that this Court may appreciate the allegations Plaintiff did make, which the Court of Appeals clearly understood, we have attached as Respondent's Appendix a copy of the Complaint. The Plaintiff's allegations clearly accused the employer of terminating her in order to deprive her of ERISA benefits, or the right to participate in ERISA plans. These other matters, Arvida's effort to reduce its payroll costs (Petition p. 6), that Arvida was involved in a reduction in force to reduce payroll costs (Petition p. 7), or that the restructuring of its sales force was motivated by its goal of reducing payroll expenses, including reduction of future benefit costs (Petition p. 7) are Arvida's claims in this Court, not Plaintiff's claim below.

In an effort to obtain unwarranted review by this Court, Arvida attempts to recharacterize Plaintiff's Complaint, and misconstrue the decision of the Court of Appeals. We respectfully suggest that if this Court reviews the allegations of the Complaint, and the decision of the Court of Appeals, Arvida's shabby effort to distort and confuse will be apparent. Plaintiff did not claim, and the Court of Appeals did not hold, that an employer's decision to restructure its workforce violates ERISA whenever it impacts, however slightly, on employee benefits. Plaintiff did not claim, and the Court of Appeals did not hold, that any employee who is ever fired has an ERISA claim. As the Court of Appeals took great pains to note, the ERISA claim, set out in the plain language of the statute, requires an allegation of a specific intent [6], to interfere with plan rights or benefits to which the participant is, or may become, entitled to. Plaintiff's Complaint does so, as the Court of Appeals correctly found.

Accordingly, this Court should deny the petition for certiorari.

CONCLUSION

Since the Plaintiff's Complaint specifically alleges that her termination was for the purpose of depriving her of rights to which she might become entitled under an employee benefit plan, in violation of Section 510 of ERISA, the Court of Appeals correctly held that it stated a claim and reversed the District Court. In doing

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[6] As the Court of Appeals noted:

> "A plaintiff must show that the employer had the specific intent to interfere with the employee's right to benefits. This standard does not require the plaintiff to show that interference with ERISA rights was the sole reason for discharge, but does require plaintiff to show more than the incidental loss of benefits as a result of the discharge." (Petition A5-A6, citations omitted).

That, as the Court of Appeals recognized, occurs on a case-by-case basis, and is plainly inappropriate for decision by this Court on the state of these pleadings.

so, the Court of Appeals corectly determined that the District Court had erred in assuming that Section 510 of ERISA applied only to participation in plans with vested benefits. Arvida has shown no basis for this Court to review the decision of the Court of Appeals, or to reverse.

This case simply does not present the issues stated in Petitioner's "Questions Presented", let alone an issue which is appropriate for consideration by this Court. The rulings below involve the sufficiency of the allegations of the Complaint, prior to Answer. The Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 89-999-Civ-T-17c

PATRICIA SEAMAN,
Plaintiff,

v.

ARVIDA REALTY SALES, INC., a Florida corporation, ARSLP, INC., an Illinois corporation, and ARVIDA REALTY SALES, LTD., a Delaware limited partnership,
Defendants.

COMPLAINT

COMES NOW the Plaintiff, PATRICIA SEAMAN, a natural person, and brings this action against Defendants ARVIDA REALTY SALES, INC., a Florida corporation, ARVIDA REALTY SALES, LTD., a Delaware partnership, and ARSLP, INC., an Illinois corporation, and alleges:

1. Plaintiff is a natural person, a citizen of the United States and State of Florida, and a resident of the Middle District of Florida at all times material herein.

2. Defendant ARVIDA REALTY SALES, INC. is a Florida corporation, at all times material herein doing business within the Middle District of Florida, Tampa Division.

3. Defendant ARSLP, INC. is an illinois corporation, and upon information and belief a general partner of

ARVIDA REALTY SALES, Ltd., a Delaware limited partnership, both of whom were, at all times material herein, doing business within the Middle District of Florida, within this division.

4. Plaintiff was employed for many years by ARVIDA REALTY SALES, INC., or connected or affiliated entities or enterprises, as a real estate salesman, within the Middle District of Florida. At all times material herein she was a satisfactory employee and a substantial producer of real estate sales commission income, both to herself and to her employers.

5. Shortly before May 1, 1989, Plaintiff was notified that she, and all of the other sales employees of Defendants in the Sarasota area would be terminated as employees of Defendants. The stated reason for the termination was in order to eliminate the cost of providing health insurance coverage to the sales employees (and employer 401(k) and FICA contributions), and the terminated employees would be offered contracts as "independent contractors" but without certain benefits previously available, but with all other terms and conditions of employment substantially the same. Shortly thereafter the employees, including your Plaintiff, were terminated.

COUNT I

VIOLATIONS OF ERISA

Plaintiff realleges the allegations of Paragraphs 1 through 5 as fully and completely as though restated herein, and further asserts:

6. This is an action for damages and such other relief as Plaintiff may be entitled pursuant to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et seq. (hereafter ERISA). This Court has jurisdiction pursuant to 29 U.S.C. 1132(f), and 28 U.S.C. 1331 and 1337.

7. At all times material herein, up to her termination, your Plaintiff and the other sales employees were participants in employee health insurance programs sponsored by defendant employers, Defendants heerin, which plan of health insurance was an employee welfare benefit plan within the meaning of ERISA.

8. Until her termination, Plaintiff and the other sales employees were also participants in a 401(k) Plan, sponsored by the defendant employers, which 401(k) Plan was an employee welfare benefit plan within the meaning of ERISA.

9. Plaintiff and the other real estate sales employees were terminated, in order to deprive them of benefits under the aforesaid employee welfare benefit plans, and such termination constituted discrimination and interference with protected rights, in violation of the provisions of ERISA.

10. As a result of her termination, Plaintiff has been damaged in that she has lost income and earning potential, has been deprived of health benefits and contributions to and benefits resulting from her participation in the 401(k) Plan, and such losses and damages are continuing.

11. In order to protect her rights, and to obtain redress, Plaintiff has been obligated to employ the services of Frank Hamilton & Associates, P.A., and is obligated to pay such lawfirm reasonable attorney fees.

COUNT II

RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT

Plaintiff realleges the allegations of Paragraphs 1 through 11 as fully and completely as restated herein, and states:

12. This is an action for damages for violation of provisions of the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. 1961, et seq (hereafter RICO). This Court has jurisdiction pursuant to the provisions of 18 U.S.C. 1964(c), 28 U.S.C. 1331 and 28 U.S.C. 1337.

13. Defendants are an enterprise, and engage in, or the activities of which affect, interstate commerce within the meaning of RICO.

14. Defendants, and other persons, corporations and limited partnerships associated with them, whose identities are presently unknown, have engaged in a pattern of racketeering activity, as defined in 18 U.S.C. 1961, in order to acquire and maintain control of such enterprise, and have participated in the conduct of such enterprise and affairs through a pattern of racketeering activity, and have conspired to do so.

15. In order to carry out the pattern of racketeering activity, which includes the aforesaid violations of ERISA, Defendants have deprived employees of rights and benefits under ERISA, in order to coerce or compel such employees to continue in the services of the Defendants, without payment of or participation in such employee welfare benefit plans, by changing their employment status for the purpose of avoiding the obligation to collect and remit income tax withholding and collect and pay social security contributions, and to pay the cost of continued participation in the aforesaid employee welfare benefit plans, in order to reduce their expenses and increase their profits.

16. In furtherance of the conspiracy, and in order to compel your Plaintiff to waive or release her rights under ERISA, and other actions or claims she may have, Defendants have wilfully and without excuse failed and refused to pay Plaintiff earned commissions, and have withheld portions of commissions, and insisted upon a release of all claims or rights as a condition to paying

your Plaintiff what she is entitled to. Such threats and unlawful acts have been communicated or effected through mail and telephone communication, and such acts constitute mail and wire fraud, and are related predicate acts within the meaning of 18 U.S.C. 1961, et seq.

17. Your Plaintiff has been the victim of such conspiracy in that she was terminated by Defendants, in order to carry out the violation of ERISA and the attempt to coerce her, and a successful attempt to coerce other employees, into relinquishing rights under ERISA, and reducing their earnings, so as to reduce expenses and generate profits for Defendants. As a proximate consequence thereof, she has lost income and earnings (including all other benefits of such employment) and additionally been deprived of commissions to which she is entitled.

18. Such pattern of racketeering activity, which involved and injured persons other than your Plaintiff, is a regular and continuing pattern of activity, within the meaning of RICO.

COUNT III

PENDANT CLAIM FOR WAGES AND COMMISSIONS

Plaintiff realleges the allegations of Paragraphs 1 through 18 as fully and completely as though restated herein, and further alleges:

19. This is an action for damages for failure to pay earned wages and commissions. This Court has pendant jurisdiction, as it arises out of a common nucleus of related facts to the counts under which this Court has original jurisdiction.

20. Plaintiff was entitled to and has earned, commissions as a result of sales made, but not consummated, prior to her termination, pursuant to the terms of her

employment. Defendants approved the amount of her commissions, in accordance with the contractual arrangements.

21. Defendants have failed and refused to pay Plaintiff the commissions which are due her, by making unlawful deductions, and withholding not less than 20% of the commissions due her in each instance. Such unlawful withholding is continuing, and upon information and belief Defendant will continue to unlawfully withhold Plaintiff's commissions in furtherance of the conspiracies and unlawful activities set forth above.

COUNT IV

FLORIDA CIVIL THEFT STATUTE

Plaintiff reallages the allegations of Paragraphs 1 through 21 as fully and completely as though restated herein, and further alleges:

22. This is an action for damages pursuant to F.S. 772.104 and F.S. 772.11. This Court has pendant jurisdiction, as the acts complained of arise out of a common nucleus of related facts under which this Court has original jurisdiction.

23. Defendants are an enterprise within the meaning of F.S. 772.102(3).

24. The actions of Defendants constitute a pattern of criminal activity, within the meaning of F.S. 772.102(4) and Defendants have engaged in at least one other incident of criminal activity, as defined in F.S. 772.102(1), having similar intents, results, accomplices, victims and methods.

25. The actions of Defendants constituted a violation of F.S. 772.103 and F.S. 812.014(1), and as a consequence, Plaintiff has been damaged.

WHEREFORE, Plaintiff prays for damages against Defendants, in the amount of actual damages for lost

wages or commissions, lost insurance benefits and other benefits to which she is entitled under the employee welfare benefit plans, injunctive relief, treble damages under RICO and the Florida Statutes, attorney fees and costs of this action, and such other relief as she may be entitled in the premises.

Respectfully submitted,

/s/ Patricia Seaman
PATRICIA SEAMAN

/s/ Frank E. Hamilton
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Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Jury trial is demanded as of right as to all matters so triable.

/s/ Frank E. Hamilton, III
FRANK E. HAMILTON, III, ESQUIRE